WILLIAM JACKS & CO. (M) SDN. BHD.

v.

CHEMQUIP (M) SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
WAN ADNAN J
[CIVIL SUIT NO. D5-22-870-90]
31 OCTOBER 1990

CIVIL PROCEDURE: *Whether solicitors acting without authority of plaintiff - Proper method of raising this issue - Inherent jurisdiction of Court - Onus of proof.*

On 30 May 1990 the Court granted an interim injunction restraining the defendant from doing certain acts; on 28 June 1990 the defendant applied by way of summons-in-chambers to set aside the injunction, contending (at the conclusion of the trial during arguments as to costs) that the solicitors for the plaintiff W were acting without the authority of W. W's Counsel K submitted that the proper method for raising the question of the want of authority was an application by motion or summons before the Court for stay of the proceedings.

Held:

[1] The correct proposition is that the method of raising the question of want of authority is usually by a substantive application to stay proceedings; however that is not the only permitted manner. The Court may, in its inherent jurisdiction, entertain the challenge made orally at any stage of the proceedings and may refuse to proceed further with the proceedings if the Court can come to a conclusion on sufficient or admitted evidence that there is no action properly before it.

[2] The burden of proving that the suit had been instituted with proper authority rests on W; K did not produce any evidence to show that there was proper authority. There is sufficient evidence for the Court to conclude that there was lack of authority to institute the proceedings.

[Action by W held to be irregular and struck out.]

Cases referred to:

Khoo Leong Kee v. L.Y. Swee & Co. Ltd. [1968] 2 MLJ 104
Chin Kok Kwong Construction Sdn. Bhd. v. Sunrise Towers Sdn. Bhd. [1986] 2 MLJ 41
Simmons v. Liberal Opinion Ltd. [1911] 1 KB 966
Richmond v. Branson & Son [1914] 1 Ch D 968
John Shaw & Sons (Salford) Ltd. v. Peter Shaw & John Shaw [1935] 2 KB 113
United Investment & Finance Ltd. v. Tee Chin Yong & Ors. [1967] 1 MLJ 31

For the 1st and 2nd defendants - Balaguru; M/s. A.K. Lee & Co.
For the plaintiff - Charles Kraal; M/s. Paul Chong & Kraal

JUDGMENT

Wan Adnan J:

On 30 May 1990, on an *ex parte* application of the plaintiff I granted an interim injunction restraining the defendants from doing certain acts. By the summons-in-chambers dated 28 June 1990 (encl. 14) the defendants applied for the said injunction to be set aside.

At the hearing of the said summons-in-chambers in Open Court Counsel for the defendants raised a preliminary objection. He alleged that the solicitors for the plaintiff were acting without authority from the plaintiff company. He said that on 26 September 1990 he wrote to M/s. Paul Chong & Kraal, the solicitors for the plaintiff requesting them to show him their authority to act for the company in the matter. When no reply was received on 3 October 1990 he wrote them another letter giving them notice that their authority to act for the plaintiff would be questioned on the hearing of the summons-in-chambers set for 4 October 1990.

Mr. Kraal & Counsel for the plaintiff did not attempt to show that he had the authority to act but submitted that the proper method for raising the question of the want of authority was by an application to stay the proceedings. There ought to be an application by motion or summons before the Court could entertain the challenge.

In *Khoo Leong Kee v. L.Y. Swee & Co. Ltd.* [1968] 2 MLJ 104, Raja Azlan Shah J (as he then was) said, "The application to question the lack of authority may be made at any stage in the proceeding, even at the conclusion of the trial." In this case the question was raised at the conclusion of the trial during arguments as the costs.

In *Chin Kok Kwong Construction Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1986] 2 MLJ 41 the question of the lack of authority was raised during the hearing of the plaintiff's application to amend the indorsement and the statement of claim.

These two cases followed the decision in *Simmons v. Liberal Opinion Ltd.* [1911] 1 KB 966.

In *Richmond v. Branson & Son* [1914] 1 Ch.D. 968, Warrington J said:

> The real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the Court, to justify that proposition. The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in the proper form of proceedings, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority.

However, in *John Shaw & Sons (Salford) Ltd. v. Peter Shaw & John Shaw* [1935] 2 KB 113, Slesser LJ said:

> In my view, the reasons for the conclusion of the House of Lords and of Lord Atkin LJ in the *Russian Bank* case and of Warrington J in *Richmond v. Branson* were that in those cases question of fact on which it needed to be decided whether there was or was not authority had to be considered, and the Court declined to go into such matters of evidence except upon a substantive motion. The rights of the Court in its inherent jurisdiction to stay actions which would be an abuse of its process if they are not properly upon the record, either because the plaintiff was not existent at the time of the issue of the writ or because they are satisfied on the facts that he had not authorised the proceedings, has so far been undoubted, and this, altogether apart from the desire of either party, if the facts are before the Court. Where the Court may come to a conclusion on sufficient or admitted evidence that there is no action properly before it, it may well think it right to act in accordance with that inherent jurisdiction, to refuse to proceed, and the difference which has been sought to be found between the case where no retainer could be given at all, and the case where what is still in dispute is whether in fact there was or was not authority to give one is not a difference in principle, but a difference of expediency, depending upon whether a Court is or is not so informed of the facts that it does or does not think it right to come to a conclusion on the matter as a question of law.

In my view the correct proposition is that the method of raising the question of want of authority is usually by a substantive application to stay proceedings. That is not the only permitted manner. The Court may in its inherent jurisdiction entertain the challenge made orally at any stage of the proceedings and may refuse to proceed further with the proceedings if the Court can come to a conclusion on sufficient or admitted evidence that there is no action properly before it.

In this case the challenge had been made. The burden of proving that the suit had been instituted with proper authority therefore rests on the plaintiff company [(see *United Investment & Finance Ltd. v. Tee Chin Yong & Ors.* (1967) 1 MLJ 31]. Counsel for the plaintiff did not produce any evidence to show that there was proper authority. I find there is sufficient evidence before me to conclude that there was lack of authority to institute the proceedings. I therefore find the action irregular and should be struck out.

I therefore ordered that the action be struck out and that the costs be borne by the plaintiff. It follows that all orders made in the action are discharged.

Also found at [1991] 1 CLJ 184